Chong Huat. It would be said he was a giant so to speak, in the family hierarchy and it could not be expected of them to challenge the authority of the eldest son in family matters.

Finally having regard to all the evidence, on the balance of probabilities, I find that the petitioner has succeeded in his petition and I duly hold that the land was held in trust by Koh Chong Huat for the Koh family and the company that was incorporated through Koh Chong Huat's efforts and their shares held in whatever denominations belong to the Koh family and held by the defendant for them.

I make an order in the terms what was prayed in this petition with liberty to petitioner to further apply for consequential orders with costs to the petitioner.

KWONG YIK BANK BERHAD

v.

SA'ADIAH BINTI MASTAN

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SHAIK DAUD BIN HJ.
MOHD ISMAIL J.
[CIVIL SUIT NO: D1-23-C847-86]
8 DECEMBER 1992

PRACTICE & PROCEDURE: Appeal - 3rd defendant's application to set aside judgment in default allowed by SAR - 3rd defendant guarantor for facilities granted to 1st defendant - Contention that facilities cancelled and superceded by new facilities - At time of new offer 3rd defendant no longer director of 1st defendant - Question of 3rd defendant's liability on the guarantee - Whether any defence on the merits.

PRACTICE & PROCEDURE: 3rd defendant's first application to set aside judgment in default before another Court unsuccessful - 3rd defendant making second application to set aside judgment in default - Whether permissible.

This was an appeal by the plaintiff from the decision of the learned Senior Assistant Registrar (SAR) allowing the application of the 3rd defendant to set aside a judgment in default entered against her.

The plaintiff's claim was based on facilities granted to the 1st defendant *vide* letter of offer dated 10 November 1983 which the 3rd defendant, as one of the directors of the 1st defendant, guaranteed. The 3rd defendant contended that the original facilities were subsequently cancelled and superceded by new facilities *vide* letter of offer 8 March 1985 at which time she had already effectively resigned as a director of the 1st defendant. The plaintiff contended that the second offer had nothing to do with the 3rd defendant and further that the 3rd defendant's application should not be litigated as it had been argued four years ago when she unsuccessfully applied to have the judgment set aside before another High Court.

Held:

[1] The plaintiff's contention that the second offer had nothing to do with the 3rd defendant could not be a valid contention especially when the new offer contained an express condition that "a joint and several guarantee of all the directors be taken". It was not denied that by

the date of the second offer the 3rd defendant was no longer a director and as such may well have been not liable on the guarantee. The Court agreed with the 3rd defendant's contention that if the second offer was not meant to supercede and cancel the first offer and the 3rd defendant was still meant to be liable under the guarantee on the strength of the first offer why was there the necessity to request for a fresh joint and several guarantee of all directors existing as at the date of the second offer?

[2] In an application to set aside a default judgment the applicant need not prove her defence. She merely needs to show that she has a defence on the merits. While it was conceded by the 3rd defendant that her application to have the default judgment set aside some 4 years ago before another High Court was unsuccessful, it was based on a different reason entirely. Her earlier application was based solely on the issue of non-service while in this application she was challenging the second letter of offer of new facilities to the 1st defendant. The Court was satisfied that the 3rd defendant had raised a defence and therefore dismissed the plaintiff's appeal with costs and confirmed the decision of the learned SAR.

[Plaintiff's appeal dismissed with costs].

[Editorial Note: The plaintiff appealed to the Supreme Court vide Civil Appeal No. 2-286-1992 which was heard on 24 May 1994. The Supreme Court dismissed the appeal with costs and granted leave to the defendant to enter her defence.**]**

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 42 r. 12,

For the plaintiff - Su Tiang Joo; M/s. Cheah Teh & Su
For the defendant - T.H. Su; M/s. T. H. Su & Co.

JUDGMENT

Shaik Daud bin Hj. Mohd Ismail J:
This is an appeal by the plaintiff from the decision of the Senior Assistant Registrar whereby she allowed an application by the third defendant to have a judgment entered against her be set aside, on the ground that she has a valid defence to the plaintiff's claim. On 26 June 1986 the plaintiff had obtained a judgment in default of appearance against the third defendant for the sum of RM205,353.24 with interest at the rate of 14.75% per annum with monthly rests from 1 December 1985 until payment; RM237,433.50 with interest at the rating of 15.75% per annum on the sum of RM203,872.40 from 1 December 1985 until payment and RM4,805.89 with interest at 14.75% per annum on RM4,351.00 from 1 December 1985 until payment.

At the trial before the learned Senior Assistant Registrar it was the defendant's contention that the judgment in default of appearance entered as stated above is irregular and defective in that it contravenes the then existing O. 42 r. 12 of the Rules of the High Court 1980, which only allowed for plaintiff to claim interest of 8% per annum from date of judgment. Plaintiff's reply to this is simple they had applied for an amendment to the default judgment in order to comply with O. 42 r. 12 and which application was allowed by the learned Senior Assistant Registrar. The next issue raised by the third defendant is that the plaintiff's claim is based on facilities granted to the first defendant *vide* the plaintiff's letter of offer dated 10 November 1983. She contends that she is a housewife and was appointed a director of first defendant to give an impression of bumiputra participation which fact is not uncommon nowadays. She contends that after the facilities granted to the first defendant for which the third defendant guaranteed in 1983 had been cancelled on or about March 1985 and replaced with new facilities. This apparently is contained in a letter from plaintiff dated 8 March 1985 which *inter alia* states that the new offer is to supercede and cancel the previous letter of offer dated 10 November 1983. The third defendant contends that by 8 March 1985 she had already resigned as a director of first defendant effective 25 January 1985.

The plaintiff contends that third defendant's application should not be litigated as it was thrashed out some four years ago when she unsuccessfully applied to have the judgment set aside before another High Court.

In an application to set aside a default judgment the applicant need not proof her defence. What she need do is merely to show that she has a defence on the merits. While it is conceded by the third defendant that her application to have the default judgment set aside some four years ago before another High Court was unsuccessful, it was based on a different reason entirely.

Her earlier application was based solely on the issue of non-service while in this application she is challenging the second letter of offer of new facilities to the first defendant and the plaintiff's assertion that the second offer supercedes and cancels the previous facilities.

It is my considered view that the third defendant has successfully shown that she has a defence. Of course whether she succeeds or not is not the issue at this stage. The plaintiff's contention that the second offer has nothing to do with third defendant cannot, to my mind, be a valid contention especially when the new offer contained an express condition that "a joint and several guarantee of all the directors be taken". It is not denied that by the date of the second offer third defendant was no longer a director and as such may well be not liable on the guarantee. I agree with the contention of the third defendant that if the second offer is not meant to supercede and cancel the first offer and third defendant is still meant to be liable under the guarantee executed by her on the strength of the first offer why therefore is the necessity to request for a fresh joint and several guarantee of all directors existing as of the date of the second offer?

The issue before me is whether the third defendant has raised some defence. If the plaintiff contends that she has no defence they can still proceed to strike it out under O. 18 r. 19 or proceed for summary judgement under O. 14. As I said I am satisfied that third defendant has raised a defence and therefore I dismiss plaintiff's appeal with costs and confirm the decision of the learned Senior Assistant Registrar.

LAM GOW & ANOR

v.

MAJU-TEKNO SDN. BHD. & ANOR.

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[ORIGINATING SUMMONS NO. 24-668-93]
12 AUGUST 1994

CONTRACT: Sale and purchase of land - Misdescription - Size of land smaller by 25.19% - Whether a material misdescription - Whether there was a substantial failure of performance - Whether there was acceptance by conduct of the reduction in the size of the land - Rescission - Whether contract could be avoided - Contracts Act 1950 s. 76.

By a sale and purchase agreement the plaintiffs contracted to purchase from the defendants a piece of land measuring 258 square metres in area together with a terrace house thereon for RM 72,859. The plaintiffs later discovered that the size of the land only measured 193 square metres i.e smaller by 65 metres. That apart the plaintiffs had also discovered that the land was sited adjacent to a road which was on a steep elevation which, according to the plaintiffs, was something they had not envisaged before executing the contract. The plaintiffs contended that there was a substantial failure of performance on the part of the defendants and on that ground sought to rescind the agreement.

The first defendant, the developer of the land, did not dispute the plaintiffs' averments aforesaid, but contended that by virtue of a compensation clause in the agreement which in effect allowed any reduction in the size of the land to be compensated for, the plaintiffs were not entitled to terminate the agreement. They also alleged that the plaintiffs knew that there was a road next to the land they had purchased as the road was clearly shown in the plan attached to the agreement and therefore it was not open for the plaintiffs to raise that issue herein.

The question for determination was whether the said misdescription in the size of the land and the proximity to the land of a road on a steep hill had so materially affected the subject matter of the agreement as to cause a substantial failure of performance of the contract, thereby entitling the plaintiffs to avoid the agreement.